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No. 70-240

In the Supreme Court of the United States

OCTOBER TERM, 1971

PVT. E2 DONALD JACK ANDERSON NG26382581,
PETITIONER

v.

MELVIN LAIRD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The order of the district court is not reported. The opinion of the court of appeals (Pet. App. 1a) is reported at 437 F. 2d 912.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1971. By order of April 20, 1971, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including May 14, 1971; further extensions of time were granted by Mr. Justice Marshall to and including May 29, 1971, and thereafter to and including June 3,

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1971. The petition for a writ of certiorari was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, an enlisted member of the Illinois Army National Guard, was subject to activation pursuant to 10 U.S.C. (Supp V) 673a for unsatisfactory participation in reserve duties.

2. Whether the courts should review and overturn the determination of petitioner's superior officer that he did not present a neat appearance at National Guard Reserve drills.

STATUTE INVOLVED

10 U.S.C. (Supp. V) 673a provides in relevant part:

> (a) Notwithstanding any other provision of law, the President may order to active duty any member of the Ready Reserve of an armed force who—
>
> (1) is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve;
>
> * * * * *
>
> (b) A member who is ordered to active duty under this section may be required to serve on active duty until his total service on active duty equals 24 months. If his enlistment or other period of military service would expire before he has served the required period under this section, it may be extended until he has served the required period.
>
> * * * * *

STATEMENT

The essential facts are not in dispute. In 1966, petitioner enlisted for six years in the Illinois Army National Guard. During February and March 1970, he attended a total of six training assemblies while wearing his hair "in a style currently fashionable" (Pet. App. 3a). His unit commander informed him each time that his hair style did not conform to the requirements of Army regulation 600–20,[1] and thus that he failed to present a "neat and soldierly appearance," within the meaning of Army regulation 135–91–5(d)(2).[2] His participation was declared unsatisfactory for each training assembly he attended while wearing his hair in this manner, and he was "charged with an unexcused absence" (AR 135–91–5 (d)(2)) on each occasion. As a result, petitioner accumulated a total of six unexcused absences, and his National Guard unit gave him notice that he would be ordered to active duty under 10 U.S.C. 673a;[3] he was told he could appeal (Pet. App. 4a).

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[1] That regulation then provided in pertinent part the "[t]he hair to include sideburns will be well groomed, cut short or medium length and neatly trimmed at all times. The face will be clean shaven, with the exception that wearing a neatly trimmed mustache is permitted."

[2] The relevant portion of the regulation is set forth at Pet. App. 12a.

[3] Petitioner attended training assemblies with his hair so styled on three separate days during this two-month period; two training assemblies were held each day. A reservist absent without authority at five or more training assemblies during one year is subject to call active duty under 10 U.S.C. (Supp. V) 673a for failure to participate satisfactorily in his reserve unit (Pet. App. 3a).

Petitioner took an administrative appeal, challenging the prospective order to active duty on the ground that others in his unit had hair styles similar to his but were not reprimanded in any way (Pet. App. 4a). His appeal was rejected on July 1, 1970, and he was ordered to active duty commencing July 11, 1970.

Petitioner then instituted the present action in the United States District Court for the Northern District of Illinois, seeking mandamus and preliminary injunctive relief against being ordered to active duty in the Army. On July 10, 1970, the district court denied petitioner's request for a preliminary injunction.

Petitioner appealed this ruling, and the court of appeals affirmed (Pet. App. 1a–11a), finding that the district court did not abuse its discretion in declining to issue a preliminary injunction. Noting that there was not "any reasonable probability of plaintiff's ultimate success" on the merits (Pet. App. 4a), the court of appeals concluded: "* * * we can find no justification warranting our interference with the discretionary decision of the military to impose certain standards of appearance to govern its members" (Pet. App. 6a).

ARGUMENT

The decision below is not in conflict with decisions in other circuits and presents no question which warrants further review of the petition.

1. Congress has determined that all young men are liable for military service and, in order to fulfill his military obligation, petitioner voluntarily enlisted in the National Guard as a reservist for six years. See 50

U.S.C. App. 456(c)(2)(A). At the time of his enlistment (as at present), the law provided (50 U.S.C. App. 456(c)(2)(D)) that a reservist whose performance of reserve obligations was unsatisfactory would be subject to induction into the Armed Forces on a priority basis by his local draft board. Such induction could be at any time during the six-year enlistment; he could be required to serve two full years with no credit for prior active duty.

Subsequent to petitioner's enlistment 10 U.S.C. (Supp. V) 673a became effective, providing additionally that the President may directly activate, for a period of two years, less time already spent on active duty, any Ready Reservist who is not "participating satisfactorily." In practical effect (except for the credit for prior service), this provision adds little to the law as it was when petitioner enlisted; in both cases the reservist is subject to active duty under identical circumstances.[4] See *Winters* v. *United States*, 281 F. Supp. 289, 292 (E.D. N.Y.), affirmed *per curiam* 390 F. 2d 879 (C.A. 2), certiorari denied, 393 U.S. 896.

The Army has prescribed by regulation that a condition to satisfactory participation in reserve drills is that the reservist present "a neat and soldierly appear-

[4] Activation by Selective Service would give petitioner no greater procedural rights than he has under 10 U.S.C. (Supp V) 673a. Under 50 U.S.C. App. 456(c)(2)(D), the reservist is ordered to report for priority induction "regardless of the class in which he is classified and without changing his classification." 32 C.F.R. 1631.8. Accordingly, claims to exempt or deferred status would not be entertained by his local board in these circumstances.

ance" at his training assemblies (AR 135–91–5(d)(2).[5] It is, of course, well known that the military insists that its members maintain a certain uniform appearance and petitioner assumed the burden imposed by this requirement when he voluntarily enlisted. His activation for failing to continue to meet this requirement was within military competence. See *Gianatasio* v. *Whyte*, 426 F. 2d 908 (C.A. 2), certiorari denied, 400 U.S. 941; *Byrne* v. *Resor*, 412 F. 2d 774 (C.A. 3); *Raderman* v. *Kaine*, 411 F. 2d 1102 (C.A. 2), certiorari dismissed, 396 U.S. 976; *Smith* v. *Resor*, 406 F. 2d 141 (C.A. 2). From his enlistment in the National Guard, petitioner derived clear benefits. He should be held to the burdens which are inherent in military service. As the Second Circuit observed in *Raderman* v. *Kaine*, *supra*, 411 F. 2d at 1106:

> The problem with a reservist * * * is that he is neither a civilian nor a full-time soldier. In effect he must live in two worlds, one military and one civilian and attempt to satisfy the requirements of both. As in this case, the demands of each may conflict and, while the result may appear harsh, he made the choice some time ago to join a reserve unit. Concomitant with

[5] Petitioner does not claim, as he cannot, that the Army is without authority to promulgate such a regulation. See *Doyle* v. *Koelbl*, 434 F. 2d 1014, 1015 (C.A. 5), certiorari denied, No. 1407, October Term 1970, decided April 19, 1971. As pointed out by the court below (Pet. App. 2a–3a), the President has delegated his authority under 10 U.S.C. (Supp. V) 673a to the Secretary of Defense, and he, in turn, has designated the Secretary of the Army to exercise that authority. Executive Order No. 11,366, 3 C.F.R. (Supp. 1967) 312. Pursuant thereto, the Secretary of the Army has defined "satisfactory participation" in AR 135–91–5(d) (dealing specifically with reserve components) and in AR 600–20 (dealing with all components).

> that decision was the knowledge that he would be subject to Army rules and regulations concerning his appearance for six years. * * *

To the extent that the Army appearance regulations might be said to impinge on petitioner's constitutional rights under the First and Ninth Amendments, as petitioner contends, that is a legitimate exercise of authority by the military in order "to meet certain overriding demands of discipline and duty." *Burns* v. *Wilson*, 346 U.S. 137, 140; *Raderman* v. *Kaine, supra*, 411 F. 2d at 1104. Nor should federal courts assume the task of reviewing the military's determination as to what constitutes a neat appearance required of enlisted men. As this Court stated in *Orloff* v. *Willoughby*, 345 U.S . 83, 94: "Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[6]

2. Petitioner contends, however, that the requirement of AR 600–20, that "[t]he hair to include sideburns will be well groomed, cut short or medium length and neatly trimmed at all times," is unconstitutionally vague. But, as the court below points out (Pet. App. 7a), "[b]y this standard the military has sought to grant unit commanders discretion in dealing

[6] Petitioner places heavy reliance on *Breen* v. *Kahl*, 419 F. 2d 1034 (C.A. 7), certiorari denied, 398 U.S. 937. But that case involved the right of civilians, *i.e.*, school children, to determine the length of their hair; it did not concern the question whether an enlisted man was subject to military appearance regulations as a condition to his satisfactory participation in reserve drills.

with the appearance of men under their command." And, such discretionary judgments of military officers have consistently been held to be beyond the review of civil courts. See, *e.g.*, *Gianetasio* v. *Whyte*, *supra*, 426 F. 2d at 911; *Byrne* v. *Resor*, *supra*, 412 F. 2d at 775; *Raderman* v. *Kaine*, *supra*, 411 F. 2d at 1105; *Smith* v. *Resor*, *supra*, 406 F. 2d at 145, and cases cited therein.

Moreover, the argument that the requirement relating to hair length was not sufficiently precise to apprise petitioner of what was necessary to meet the neat appearance standard is belied by this record. For more than three years petitioner admits to full compliance with the applicable regulation without difficulty of interpretation as to its intended meaning (Pet. 4–5). When his unit commander first determined that petitioner's hair, styled in a manner "currently fashionable" (Pet. App. 3a), did not conform to military standards, he personally informed petitioner of that fact (Pet. App. 7a). Thus, petitioner cannot now assert that his refusal thereafter to get his hair "cut short or medium length and neatly trimmed" was without knowledge that such "conduct * * * rendered him subject to discipline" (Pet. App. 7a).[7]

[7] Moreover, the question of vagueness under the language of the regulations at the time petitioner failed to comply with the applicable standard is no longer of continuing importance. A recent amendment to AR 600–20, which became effective on May 28, 1970, sets forth exceedingly precise standards which must be satisfied in order for a serviceman's hair style to present a "neat and soldierly appearance" (see Pet. 11).

CONCLUSION

For the reasons stated, it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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